IN THE SUPREME COURT OF THE STATE OF MISSOURI

Case No. SC92805

BOARD OF MANAGERS PARKWAY TOWERS CONDOMINIUM ASSOCIATION, INC., a Missouri Nonprofit Corporation,
Respondent

v.

TRISH CARCOPA,
NICOLE CARCOPA,
OPTION ONE MORTGAGE, AND
UNITED STATES OF AMERICA

OPTION ONE MORTGAGE CORPORATION,
Appellant.

Appeal from the Circuit Court of Jackson County, Missouri,
Hon. Robert M. Schieber

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

The Respondent hereby adopts the jurisdictional statement as recited in Appellant's trial brief.

STATEMENT OF FACTS

The Respondent hereby adopts the statement of facts as recited in Appellant's trial brief and adds the following statement of facts:

Parkway Towers Condominium Association, organized in 1973 pursuant to § 448.010 RSMo (1983), is compromised of unit owners. Transcript at pg. 6, lines 10-13. The Board of Managers of Parkway Towers Condominium Association is the executive board designated in the declarations to act on behalf of the association. *Id.* at pg. 10, lines 10- 13. The multi-unit building (consisting of 144 individual units owned in fee by separate owners and the remainder of which is designated for common ownership solely by the owners of the units) is located in the Country Club Plaza of Kansas City, Missouri. *Id.* at pg. 6, lines 8-9, pg. 10, lines 10.

The common areas of Parkway Towers were in need of major repairs including structural components of the building, heating and cooling systems and updating/refurbishing non-structural common elements such as the hallways. *Id.* at pg. 19, lines 6- 16. The unit owners approved an assessment for the improvements in an amount of two million seven hundred thousand dollars. *Id.* at pg. 24, lines 10-12, pg. 34, lines 1- 3. The Carcopas' percentage of ownership in the common elements was 0.7169 percent. *Id.* at pg. 13 lines 8-9. The Carcopas owe the condominium association

SEVENTY-EIGHT THOUSAND ONE-HUNDRED FORTY-FOUR DOLLARS AND SIXTY-FOUR CENTS ($78,144.64) for dues, assessments and parking. *Id.* at pg. 47, lines 1-4.

The trial court entered judgment for Parkway Towers and ordered that the lien be judicially foreclosed. *Id.* at pg. 7, lines 1-4. Appellant's lien was adjudicated to be inferior and subordinate to the lien of Parkway Towers. *Id.* at pg. 7, lines 1-4.

POINTS RELIED ON

I. The trial court did not err in ruling that Respondent's assessment lien had priority over Appellant's Deed of Trust because the statute providing for priority of condominium association assessment liens is constitutional in that the terms of the statute are free from ambiguity or vagueness and because Appellant enjoys the benefits from the super-priority status of the assessment lien.

A. Missouri's substantial and significant deviation from the Uniform State Laws' "Uniform Condominium Act".

Mo. Rev. Stat. § 1.14 (1949)

Mo. Rev. Stat. § 448.010 (1983)

Mo. Rev. Stat. § 448.1-103 (1983)

Mo. Rev. Stat. § 448.3-102 (1983)

Mo. Rev. Stat. § 448.3-116 (1998)

Carroll v. Oak Hall Associates, 898 S.W.2d 603 (Mo. App. 1995)

Dunhill Condominium Assoc., Inc. v. Gregory, 492 S.E.2d 242 (Ga. App. 1997)

In re. Quirk's Estate, 257 Mo. 422, 432 (Mo. 1914)

Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685 689 (Mo. 2006)

B. Mortgagees benefit from common area improvements and should share in the burden. Mo. Rev. Stat. § 448.1-103 (1983)

Mo. Rev. Stat. § 448.3-102 (1983)

Mo. Rev. Stat. § 448.3-116 (1998)

II. The trial court did not err in ruling that Respondent's assessment lien had absolute priority over Appellant's deed of trust should be affirmed because none of the exceptions provided in § 448.3-116.2 apply to the facts of this case and if in fact subsection (4) of § 448.3-116.2 is unconstitutional the severance of that subsection does not alter the court's decision.

Mo. Rev. Stat. § 1.14 (1949)

Mo. Rev. Stat. § 448.3-116 (1998)

Bd. of Educ. Of City of St. Louis v. State, 47 S.W.3d 366 (Mo. banc 2001)

Carroll v. Oak Hall Associates, 898 S.W.2d 603 (Mo. App. 1995)

III. The trial court did not err in granting Respondent's Assessment Lien complete priority because the enforcement provisions of § 448.3-116 are harmonious with the provisions of Chapter 443 and are neither vague nor do they contravene some constitutional provision.

Mo. Rev. Stat. § 448.2-101 (1983)

Mo. Rev. Stat. § 448.2-105 (1983)

Mo. Rev. Stat. § 443.290 (1965)

Mo. Rev. Stat. § 443.310 (1989)

Mo. Rev. Stat. § 443.320 (1989)

Mo. Rev. Stat. § 443.440 (1939)

Mo. Rev. Stat. § 448.1-114 (1983)

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Mo. Rev. Stat. § 448.3-119 (1983)

Bitting v. Central Pointe Condo. Bd. Of Managers, 970 S.W.2d 898 (Mo. App. ED. 1998)

Carroll v. Oak Hall Associates, 898 S.W.2d 603 (Mo. App. 1995)

38 Stephen Max Todd, *Missouri Foreclosure Manual*, § 2:1 (2012-2013 ed.)

ARGUMENT

I. The trial court did not err in ruling that Respondent's assessment lien had priority over Appellant's Deed of Trust should be affirmed because the statute providing for priority of condominium association assessment liens is constitutional in that the terms of the statute are free from ambiguity or vagueness and because Appellant enjoys the benefits from the super-priority status of the assessment lien.

Parkway Towers Condominium Association, organized in 1973 pursuant to

§ 448.010 RSMo (1983), is compromised of unit owners. The Board of Managers of Parkway Towers Condominium Association is the executive board designated in the declarations to act on behalf of the association. The multi-unit building (consisting of 144 individual units owned in fee by separate owners and the remainder of which is designated for common ownership solely by the owners of the units) is located in the Country Club Plaza of Kansas City, Missouri.

The common areas of Parkway Towers were in need of major repairs including structural components of the building, heating and cooling systems and updating/refurbishing non-structural common elements such as the hallways. The unit owners approved an assessment for the improvements in an amount of two million seven hundred thousand dollars. The Carcopas' percentage of ownership in the common elements was 0.7169 percent. The Carcopas owe the condominium association SEVENTY-EIGHT THOUSAND ONE-HUNDRED FORTY-FOUR DOLLARS AND SIXTY-FOUR CENTS ($78,144.64) for dues, assessments and parking.

The trial court entered judgment for Parkway Towers and ordered that the lien be judicially foreclosed. Appellant's lien was adjudicated to be inferior and subordinate to the lien of Parkway Towers. Appellant, whose lien arose from a refinancing of the original purchase-money lien, argues that its lien should be superior to the assessments because its refinancing lien was filed of record prior to the improvements to the property. However, the relevant statute in Missouri addressing this issue grants only four specific exceptions to the priority of a condominium lien. The Appellant's lien does not fall

within any of these enumerated exceptions. Therefore, judgment of the trial court should be affirmed.

Missouri grants super-priority status to condominium associations for enforcement of liens for dues and assessments. The refinance deed of trust of Appellant is inferior and subordinate to that of Parkway Towers pursuant to § 448.3-116. Appellant argues that this statute is unconstitutional.

A. Missouri's substantial and significant deviation from the Uniform State Laws' "Uniform Condominium Act".

Missouri did not adopt the Uniform State Laws' "Uniform Condominium Act" (hereinafter referred to as "UCA"). The uniform law was used as a "model", but the General Assembly modified the provisions of the suggested language in accordance with Missouri's legislative goals. The comments to the uniform laws are not instructive regarding § 448.3-116 because Missouri intentionally deviated from the uniform law. Whereas the "Uniform Laws" treats all mortgages of record in the same manner and limits the priority of the condominium lien, Missouri elected to grant super-priority status to condominium liens with very narrow exceptions. This policy decision is logical when one considers that the preservation and enhancement of the condominium assets is beneficial not only to the unit owners, but to lenders relying on the value of the assets when making and enforcing loans to the unit owners. "Public policy requires that condominium associations have sufficient power to enforce the collection of assessments; otherwise, the association will not be able to continue to function and meet its obligations without unfairly burdening the other members of the community." *Dunhill Condominium*

Assoc., Inc. v. Gregory, 492 S.E.2d 242, 243 (Ga. App. 1997) (citing *Carroll v. Oak Hall Associates*, 898 S.W.2d 603 (Mo. App. 1995), (for the proposition that "subordination of condominium association's lien is the exception rather than the rule and statutory exceptions to priority of condominium association's lien should be strictly construed.").

Appellant argues that § 448.3-116 RSMo (1983 as amended 1998) is unconstitutional. Respondent disagrees with this argument. Section one of the statute provides that the association has a lien on a unit for any assessment levied against the unit from the time the assessment becomes due. Section two of the statute provides for the narrow exceptions to priority:

> 2. A lien pursuant to this section is prior to all other liens and encumbrances on a unit except:
>
> (1) Liens and encumbrances recorded before the recordation of the declaration;
>
> (2) A mortgage and deed of trust for the purchase of a unit recorded before the date on which the assessment sought to be enforced became delinquent;
>
> (3) Liens for real estate taxes and other governmental assessments or charges against the unit,
>
> (4) Except for delinquent assessments or fines, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest. This Subsection does not affect the priority of mechanics' or materialman's liens, or the priority of liens made for other assessments made by the

association. The lien pursuant to this section is not subject to the provisions of section 513.475, RSMo.

The Missouri legislature clearly focused most of its attention on Section two (2) of § 448.3-116 by making some significant changes and taking extra precautions in protecting the priority status of assessment liens. Although Section two (2) of § 448.3-116 provides exceptions to the assessment liens similar to the UCA, Missouri provides a much narrower scope as to the types of transactions that will defeat the assessment lien's super-priority status. Most significantly, subsection two limits priority claims to those holding a "purchase money" mortgage or deed of trust whereas the Uniform Laws do not differentiate between purchase money and other mortgages or deeds of trust. Secondly, subsection four of the Missouri statute is extremely narrow in its application when compared to the Uniform Law. This latter section applies only with respect to assessments that are due prior to subsequent refinancing of a unit or subsequent second mortgage. In that narrow instance, priority of the association lien is limited to delinquent assessments or fines and six months of non-delinquent assessments and fines immediately prior to refinancing. This provision has no application to the case at hand because the assessments are post, not prior to the refinancing. Therefore, Appellant's arguments regarding the constitutionality of § 448.3-116 are without merit.

"The basic principle of all statutory construction is the legislative intent." *In re. Quirk's Estate*, 257 Mo. 422, 432 (Mo. 1914). "This is true whether such intent must be drawn from the words of the act, or whether courts go to extrinsic aids to find the intent." *Id.* The language, interpretations and attempts to change the statute from subsequent bills

proposed are good sources of extrinsic evidence that reveal the true intentions of the legislature. For example, Missouri Senator Anita Yeckel sponsored bills "SB 903" in 1998 and "SB 299" in 1999, in an attempt to remove Subsection 4 altogether. The bill summary of SB 299 states as follows:

> Current law establishes a priority over a condominium association's lien for up to six month's assessments or fines if they are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest. The act removes this priority and expands the exceptions to the priority of the lien to include a mortgage or deed of trust recorded before the date on which the assessment sought to be enforced by the condominium association became delinquent.

S. 299, 90th Leg., 1st Reg. Sess. (Mo. 1999). These bills to amend Subsection 4 never passed and no subsequent bill proposals have been successful in changing the current language of § 448.3-116.2(4) since 1998. The Missouri legislature clearly intended to keep the language in Subsection 4, realizing that the exceptions were unique to the state.

Furthermore, the interpretation of the language in § 448.3-116.2(4) by SB 299 is identical to Respondent's interpretation of the reading of this section of the statute as it stood at the time the bill was proposed. The numerous interpretations that Appellant supplies in its argument against the constitutionality of § 448.3-116.2 is superfluous and baseless because the "words used in [this] statute are of common usage and are understandable by persons of ordinary intelligence." *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685 689 (Mo. 2006).

In addition, Subsections (2) and (4) are not vulnerable to any danger of discrimination and misapplication and thus are free from ambiguity or vagueness.

Senate Bill 903 sought to remove the language "for the purchase of a unit" from § 448.3-116.2(2) in an attempt to grant priority to any deed of trust or mortgage that was recorded before an assessment lien had attached. S. 903, 89th Leg., 2nd Reg. Sess. (Mo. 1998). This change would have aligned § 448.3-116.2 with the UCA and other states; however, Subsection 2 has remained unchanged since 1983. The intent of the Missouri's legislature clearly was not to adopt that language of the UCA, but to format its own interpretation as to how the statute should compare mortgages and deeds of trusts to the super-priority, assessment lien in Missouri. A reasonable interpretation of this statute would not allow a person of ordinary intelligence to apply it any differently.

B. Mortgagees benefit from common area improvements and should share in the burden.

Another important reason why an assessment lien is given super-priority status is because it benefits the mortgagees. Section 448.1-103(4) RSMo (1939) defines the term "common elements" as "all portions of a condominium other than the units." It also defines the term "common expenses" as "expenditures made by or financial liabilities of the association, together with any allocations to reserves." § 448.1-103(5). A condominium association has various powers to make assessments against unit owners to ensure that common elements are maintained and the value of that area is not diminished. Section 448.3-102 specifically gives the association the power to regulate the use, maintenance, repair, replacement, and modification of common elements or cause

additional improvements to be made as a part of the common elements. § 448.3-102(6), (7) RSMo (1939). The association also has the power to collect assessments for common expenses from unit owners at given periods. *Id.* at § 448.3-102(2).

The collection of these assessments ensure that the entire property is properly maintained and protects existing and future mortgagees from having the value of their collateral diminished as a result of any failure to improve or maintain the property by the unit owner. In essence, mortgagees are provided adequate assurances by an association that their collateral will not only be preserved and improved by the unit owner, but also by the association through assessment liens. The association is in the best position to ensure that the property is cared for at all times. In return, mortgagees like the Appellant give up some of its priority in order to enjoy the protections of their investment. The benefits enjoyed by Appellant are possible only because of the language provided in § 448.3-116. Therefore, § 448.3-116 is necessary because it creates a super-priority status for condominium associations that allows them to protect and preserve the collateral in the best interests of the mortgagee.

II. The trial court did not err in ruling that Respondent's assessment lien had absolute priority over Appellant's deed of trust because none of the exceptions provided in § 448.3-116.2 apply to the facts of this case and if in fact subsection (4) of § 448.3-116.2 is unconstitutional the severance of that subsection does not alter the court's decision.

Appellant argues that the Court misapplied the *Carroll v. Oak Hall Assoc., L.P.*, 898 S.W.2d. 603 (Mo. App. 1995) to § 448.3-116.2(4). However, Appellant misconstrues

the trial court's reference to this case with respect to the judgment entered on April 26, 2011. The trial court only referenced this case to confirm that, like in *Carroll*, the security instrument in the instant action is not a "purchase money" deed of trust. Appellant suggests in its argument that the Court was unaware that § 448.3-116 was amended after *Carroll*; however, that is not the case. Appellant, in its suggestions in opposition to Respondent's Motion for Summary Judgment, goes to great lengths to pose to the trial court the same argument articulated on this appeal. Appellant set out the applicable provisions of the statute and stated: "The *Carroll* case did not reach this issue and therefore is not instructive or applicable, as Plaintiff would have this Court otherwise believe." On April 24, 2012, the case was heard on the record and after giving all parties the opportunity to present evidence and make arguments, the trial court granted final judgment to Respondent and determined that the association lien has priority over that of the Appellant. In spite of Appellant's argument, the trial court correctly granted an interlocutory judgment in favor of Respondent on the issue of priority.

The balance of Appellant's argument in Point II of its brief is a reiteration of Point I alleging the reasons why Appellant believes that § 448.3-116 is unconstitutional. The statute is not unconstitutional; however, even if subsection (4) were determined to be unconstitutional, the application of § 1.140 RSMo (1949 as amended 1957) requires the judgment to be affirmed in that the remaining provisions of § 448.3-116 are valid. Section 1.140 RSMo provides:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional,

> the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Prior to the 1998 amendment, subsection (4) to § 448.3-116 did not exist. The 1998 amendment contained numerous revisions to a wide variety of statutes, including the addition of subsection (4). *See* 89th Leg., 2nd Reg. Sess. (Mo. 1998). The other amendments to the existing provision of § 448.3-116 were *de minimis* (i.e: "under" changed to "pursuant"). The provisions of § 448.3-116 that apply, firstly, to the creation of the priority of assessment liens, and secondly, to exceptions to priority, stand independent of each other. The sections of the statue are neither incomplete nor incapable of being executed in accordance with the legislative intent.

This Court, in *Bd. of Educ. Of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001), acknowledged that " [t]he courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." If, in fact, this Court were to determine that the provisions of § 448.3-116.2(4) are unconstitutionally void for vagueness, it follows that the remaining sections

are not essentially and inseparably connected with, and so dependent upon the void provisions as to render them invalid. Therefore, the offending provision should be severed. The result remains the same; the association's lien is prior and superior to the non-purchase lien of the Appellant pursuant to § 448.3-116.2 and the judgment of the trial court must be affirmed.

III. The trial court did not err in granting Respondent's Assessment Lien complete priority because the enforcement provisions of § 448.3-116 are harmonious with the provisions of Chapter 443 and are neither vague nor do they contravene some constitutional provision.

Appellant espouses the view that an assessment lien cannot be foreclosed "in like manner' as a power of sale. However, Parkway Towers filed its petition to determine the amount of its assessment lien; to have the lien declared prior to all other liens of record; and to have the lien judicially foreclosed pursuant to § 443.190 *et seq.* The Missouri Courts of Appeals, Eastern and Western Districts have acknowledged that the assessments, the due dates, their delinquency and all proceedings to enforce the lien, unmistakably.... are... governed by § 448.3-116. See: *Carroll v. Oak Hall Assoc., L.P. supra. a*t 606; *Bitting v. Central Pointe Condo. Bd. Of Managers,* 970 S.W.2d 898 (Mo. App. ED. 1998).

The enforcement procedure utilized in each of the above referenced cases, like the instant case, was a judicial foreclosure pursuant to § 443.190 RSMo (1939). Judicial foreclosure for lien enforcement is specifically authorized by § 448.3-116.1 (RSMo. 1998) and § 448.1-114 (RSMo. 1983) (Remedies to be liberally construed). Parkway

Towers has not sought enforcement of its assessment lien by "power of sale" and the alleged unconstitutional issue does not present itself within the facts of this case. Nonetheless, the Appellant's argument that the reference to enforcement by power of sale within § 448.3-116.1 renders the entire statute unconstitutional is without merit.

A condominium is created only by recording a declaration executed in the same manner as a deed. § 448.2-101 RSMo (1983). The required contents of the declaration are described in § 448.2-105 RSMo (1983). The statute permits the declaration to contain any other matters the declarant deems appropriate. Pursuant to this section, a declarant could provide a procedure, binding on the unit owners, permitting assessment liens to be non-judicially foreclosed, consistent with the requirements described in § 443.290 through § 443.440 RSMo.

Appellant also contends that an assessment lien is not recorded and that compliance with § 443.320 is not possible. However, it is the book and page of the recorded declaration, which constitutes the ultimate authority for the assessment lien that should be set forth in the publication. Likewise, Appellant assumes some document setting forth the amount of the assessment lien must be recorded to comply with the notice requirement of § 443.310; this is not the case. A mortgage or deed of trust does not generally describe the amount of indebtedness due, but references an unrecorded document that represents the indebtedness. The mortgage/deed of trust is merely a security instrument.

Appellant contends that a "power of sale foreclosure under Chapter 443 has to be conducted by a trustee under a deed of trust." (*See* Appellant's Brief at pg. 33, Par. 3) A

condominium declaration can certainly adopt procedures whereby the association acts as trustee or appropriates a qualified third party to do so. Any Missouri corporation with "trust" powers can act as a trustee in a deed of trust (or be empowered to act as a trustee for the association through its declarations). It is not necessary that a corporate trustee be licensed as a bank or trust company and there is no statutory prohibition against other entities acting as trustee in a deed of trust (or declaration). 38 Stephen Max Todd, *Missouri Foreclosure Manual*, § 2:1 (2012-2013 ed.) Furthermore, it is clear that the condominium association acts in the capacity of a trustee pursuant to § 448.3-119, RSMo (1983).

The provisions of Chapter 448 are not in conflict with the provisions of Chapter 443. Respondent has not proceeded to invoke the "power of sale" provisions with respect to this action. The underlying action seeks judicial foreclosure of a valid assessment lien that is senior and superior to the claim of Appellant. Respondent postulates that a condominium association could proceed by power of sale if the declaration of record sets forth the procedure for so doing. The declaration in this case provides no such procedure and § 448.3-116 permits judicial foreclosure. Therefore, no constitutional defects exist in the statute and the judgment shall be affirmed in all respects.

CONCLUSION

The trial court's entry of judgment in favor of Respondent should be affirmed in favor of Respondent and against Appellant. The provisions of § 448.3-116 are constitutional and are free from ambiguity or vagueness. Missouri clearly intended to substantially and significantly deviate from the Uniform State Laws' "Uniform

Condominium Act" (UCA) to create more of a super-priority scheme for association liens with very narrow exceptions.

Appellant has benefited from the assessment lien in that the value of its collateral has been preserved by improvements and maintenance of the common elements through assessments against the unit owners. Respondent's lien is prior, senior and superior to any other lien, including Appellant's interest in the property. Nonetheless, if the Court determines that subsection 4 is unconstitutional, only that portion of § 448.3-116 should be stricken. The other provisions should then remain valid pursuant to § 1.140 RSMo.

Finally, the enforcement provisions of § 448.3-116 standing on their own, are harmonious with the provisions of Chapter 443, regarding "power of sale", and are neither vague nor do they contravene some constitutional provision. The courts in Missouri have confirmed that association liens are governed by § 448.3-116. Chapter 443 deals with non-judicial foreclosures but this case involves a judicial foreclosure; therefore, the argument challenging foreclosure through "power of sale" is not relevant.

Therefore, the trial court's judgment should be affirmed in favor of Respondent and against the Appellant because § 448.3-116 is constitutional and Respondent's lien for assessment is prior, senior and superior to any other lien, including Appellant's deed of trust. Respondent further prays for any other such relief as the court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

Alan B. Gallas, attorney for Respondent, hereby certifies that he is in compliance with Rule 55.03, that this brief is in compliance with the limitations contained in Rule 84.06(b), that Respondent's brief contains 4749 words, that the brief was prepared using Microsoft Word, 13 point and Times New Roman font.

I also hereby certify that I electronically filed Respondent's Brief through the Missouri eFiling System this 29th day of March, 2013, and that the notification of such filing will be sent to the following eFiling participants of record in this case:

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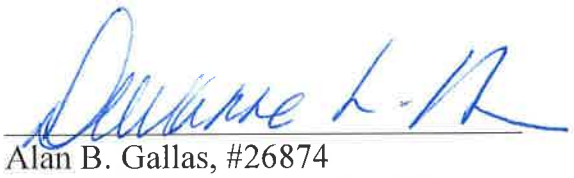
GALLAS AND SCHULTZ



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